UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR BOARD
WASHINGTON, D.C.

M.D. MILLER TRUCKING & TOPSOIL, INC.

and Case 13-CA-104166

GENERAL TEAMSTERS LOCAL UNION NO. 179,
AFFILIATED WITH INTERNATIONAL
BROTHERHOOD OF TEAMSTERS

RESPONDENT M.D. MILLER TRUCKING & TOPSOIL, INC.'S REPLY IN FURTHER SUPPORT OF ITS EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

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The ALJ's decision in this case renders completely meaningless federal regulations related to the threshold medical criteria for employees engaged in driving heavy trucks on the nation's highways--provided the employee has, at some time, engaged in protected activity under the National Labor Relations Act. The General Counsel and the Charging Party argued that Respondent was prohibited from following admittedly applicable federal regulations regarding the medical certification of one of its truck drivers--on the sole basis that that employee previously had filed a grievance. The ALJ, remarkably, agreed, and found that Respondent violated Section 8(a)(3) of the Act when it required, pursuant to its obligations under the Federal Motor Carrier Safety Regulations ("FMCSRs"), the alleged discriminatee to provide valid medical certification prior to reinstating him to drive one of Respondent's trucks. The only way the ALJ could reach his decision was to refuse to consider the controlling FMCSRs and to improperly exclude relevant evidence and testimony.

I. RESPONDENT DID NOT FAIL TO COMPLY WITH THE SUBPOENAS AND IT WAS ERROR FOR THE ALJ TO EXCLUDE THE PROFFERRED EVIDENCE

Counsel for the General Counsel and the Charging Party issued identical subpoenas *duces tecum* to the Respondent in advance of the hearing in this matter. None of the categories of documents requested in those subpoenas sought medical records (whether medical cards or long forms) related to any employee other than the alleged discriminatee, Edward McCallum ("McCallum"). *See* GC Ex. 17; Un. Ex. 1.

Despite that no such documents were requested, the ALJ refused to allow Respondent to introduce medical cards and long forms for employees other than McCallum for years prior to 2013, on the asserted basis that Respondent should have produced them in response to the subpoenas (that did not request them). What the subpoenas did request, among other items, were documents "showing communications from Respondent to Respondent's employees regarding

medical documentation for the period January 1, 2010 to the present" and "lists showing information regarding employee medical cards for the [same] time period." *See* GC Ex. 17 & Un. Ex. 1 at requests 3 & 10. Not even the broadest interpretation of those requests could encompass the documents the ALJ excluded as a sanction. The documents excluded were medical cards and long forms for employees of respondent, other than McCallum, for years prior to 2013. Those documents do not constitute "communications from Respondent to Respondent's employees" nor do they constitute "lists."

Importantly, the General Counsel does not argue that the actual language of the subpoena requests encompasses the excluded evidence. Rather, it argues that because Respondent, in response to the subpoena, provided McCallum's medical cards and long forms dating back to 2010 and medical cards and long forms for other drivers tendered in 2013, Respondent should have produced medical cards and long forms for all employees from 2010 to 2012 (again, even though such documents were never requested). However, it is important to note that other requests in the subpoenas specifically sought McCallum's medical records (e.g., GC Ex. 17, request 1) and documents related to "work rules and policies governing … medical certification requirements (GC Ex. 17, request 2).

In an admitted "abundance of caution" Respondent was over-inclusive in its response to the subpoenas. It produced McCallum's medical cards and long forms for 2010 to present and, because it did not have a formal written policy or written communication to employees regarding the requirement to supply medical cards and long forms, it produced medical cards and long forms for employees tendered in the most recent year, 2013. (Tr. 276-77) It was not until the General Counsel put its case on during the first day of the hearing that Respondent became aware that any portion of the General Counsel's case rested on an (incorrect) argument that Respondent

did not require its employees to supply evidence of their medical certification prior to 2013. Such an argument would have been difficult to anticipate as the FMCSRs also required all drivers to have the proper medical card and long form completed prior to driving the types of trucks involved in this case. FMCSR §§ 391.43(f)-(h) & 391.47. At that point, Respondent sought to rebut that argument with the medical cards and long forms of other drivers from prior to 2013.

The General Counsel and the Charging Party argued at the hearing, as they do now, and the ALJ determined, that because the Respondent included documents *that were not requested* in the subpoena, that Respondent was required to produce *even more* unrequested documents. Moreover, the ALJ determined that Respondent's failure to have produced those *additional unrequested* documents required that the ALJ exclude from the hearing documents that were not produced by Respondent in response to the subpoena that *did not request them*. The ALJ undertook no analysis of the actual language of the requests.

Tellingly, the General Counsel does not even argue that the documents excluded by the ALJ were actually encompassed within the subpoena requests. And for good reason: they clearly were not. It was error and prejudicial to Respondent for the ALJ to have excluded the medical cards and long forms for other employees that predated 2013 and it was further error, and more prejudicial, for the ALJ to have barred any testimony related to the Company's requirement to have on file medical cards and long forms for all drivers prior to 2013, as such testimony does not relate to any document sought in the subpoenas but not produced. The ALJ erred in excluding the proffered documents and further erred in not receiving testimony related to the Company's policy (predating 2013) of requiring employees to have on file their medical cards and long forms. From there, the General Counsel argues, and the ALJ wrongly assumed (in

direct contradiction to the offered but excluded evidence) that there was no requirement that Respondent's drivers were required to have on file proper medical cards and long forms prior to 2013, and that such a requirement was peculiar to McCallum, but only after he won his grievance. That finding is only possible by excluding and/or ignoring the relevant evidence and also by completely disregarding the applicable federal regulations as discussed below.

II. THE ALJ ERRED IN FAILING TO CONSIDER THE APPLICABLE FEDERAL REGULATIONS GOVERNING RESPONDENT AND ITS DRIVERS

Compounding his error above, the ALJ actively and specifically ignored and disregarded the applicable federal regulations governing driver medical qualifications, the FMCSRs. The ALJ disregarded the FMCSRs because, although the parties had extensively presented testimony related to the FMSCRs throughout the hearing, the actual text of the FMCSRs had not been made part of the record during the hearing. (ALJ Dec., p. 1) This holding is clearly erroneous and would be akin to the ALJ disregarding the NLRA or NLRB decisions because the text of those documents was not made a part of the record. The General Counsel, apparently conceding that such a holding was improper (the General Counsel does not address in its Answering Brief Respondent's argument that federal regulations are not "facts" that need to be made part of the record and that ALJs can, and properly should, apply applicable federal and state regulations) instead fabricates a holding that the ALJ never made. The General Counsel argues, instead, that the ALJ properly disregarded the applicable FMCSRs because Respondent's requirement that McCallum provide valid medical certification was pretext for anti-union discrimination. However, such an argument of pretext can only succeed if one specifically disregards the requirements of the FMCSRs in the first place (that is, the only way it can be shown that sending McCallum for a medical certification was pretext for unlawful discrimination is by ignoring the requirements of the FMCSRs mandating medical certifications). Such circular reasoning simply

should not be allowed to be fabricated to support the ALJ's erroneous decision to ignore applicable federal law on the basis that it was not "made part of the record."

III. THE ALJ ERRED IN DETERMINING THAT A *PRIMA FACIE* CASE WAS ESTABLISHED AND THAT ANTI-UNION ANIMUS WAS THE RESPONDENT'S SOLE MOTIVATION

As part of its required *prima facie* showing, the General Counsel was required to establish that McCallum suffered an "adverse action" that was substantially motivated by anti-union animus. *See Valmont Indus., Inc. v. NRLB*, 244 F.3d 454, 463 (5th Cir. 2010). The ALJ in this case went even further and found that anti-union animus was the sole motivating factor in Respondent's requiring McCallum to adhere to the FMCSR's medical certification requirements.

However, in order to manufacture an "adverse action" the General Counsel constructed the fallacy that McCallum was "effectively terminated" by virtue of Respondent's requiring him to adhere to the FMCSR's mandatory medical qualification requirements. The only way it can be found that McCallum would be "effectively terminated" by undergoing the required medical qualification screening, however, is if McCallum's condition, *in fact*, did not allow him to meet the medical qualifications. The ALJ's decision, therefore, would require the Respondent to hand over the keys to one of its trucks to an employee that had failed the federally mandated medical certification and hope that his medical condition does not result in an incident causing property damage, personal injury or even death.

The ALJ concluded that Respondent's review of McCallum's medical certification upon being ordered to reinstate him to a truck driving position, after it had observed his worsening condition and learned, for the first time, that he now required a special device to even allow him to walk properly; was evidence of animus. Despite the evidence that: (1) McCallum unlawfully failed to fully report the extent of his medical condition or the medications he was taking for his MS on the long form he supplied to his initial examining physician (*see* GC Ex. 7); (2)

Respondent consulted with an official from the Federal Motor Carrier Safety Administration (which administers the FMCSRs) on how to address the situation (Tr. 258); (3) Respondent complied with the suggestion from the FMCSA official that a further examination by an FMCSA-approved physician was appropriate (*id*.); and (4) Respondent immediately scheduled a medical examination by the FMCSA-approved physician closest to McCallum's residence (Dr. Moiduddin) (*id*.), the ALJ still found that there was no motivation, other than solely anti-union animus, on the part of Respondent in requiring the second medical evaluation. Such a determination was neither logical nor supported by the evidence. The General Counsel completely fails to address this evidence in its Answering Brief, but ignoring it will not make it disappear.

The ALJ found that Respondent had no reason to believe that McCallum's condition was in any way worse than it was when he was placed on layoff at the end of the 2012 work season. (ALJ Dec., p. 8, ll. 6-11). The General Counsel argues that McCallum's condition was not a concern to the Millers until he won his grievance and, therefore, the requirement that he undergo a medical evaluation prior to his reinstatement was pretext. However, despite McCallum's self-serving testimony that his condition had remained the same since he was diagnosed with MS in 2010, the actual uncontroverted facts (ignored or brushed aside by the ALJ as well as the General Counsel and Charging Party) tell an entirely different story. Both Chad and Marlene Miller observed that McCallum's condition was worse in the one week of work he performed after being called back from layoff in 2013 than it had been in 2012. (Tr. 313, 355). It is important to note that McCallum was terminated for insubordination at the April 11th meeting approximately one week after being called back from layoff (that termination was the subject of his successful grievance). During that one week, the Millers both observed how bad McCallum looked, even

prompting Marlene, on the one time she saw him that week, to approach McCallum out of concern for him and to discuss with him his condition and his treatments. (Tr. 313, 355). McCallum, during this conversation, failed to disclose to Marlene that he had just recently been prescribed the use of the device to electronically stimulate his foot to lift it so he could walk. (Tr. 145, 148, 355). Marlene learned of that device during the hearing on the grievance, which only bolstered her concern that McCallum was not medically qualified to perform truck driving duties and prompted her to review his medical certification upon learning he was to be reinstated to that position. (Tr. 364). Under the circumstances, the evidence simply does not support the ALJ's conclusion, or the General Counsel's argument, that the sole motivating factor for Marlene Miller to have reviewed McCallum's medical file was anti-union animus.

Moreover, the careful and thoughtful manner in which Respondent approached the situation once McCallum delivered a copy of his long form, on which he unlawfully failed to disclose his condition, its effects or the medications he was on, shows anything but animus. The Respondent did not simply refuse to reinstate McCallum, rather it contacted the FMCSA for guidance. It followed the guidance as suggested by the federal agency. Rather than creating an unattainable obstacle to McCallum's reinstatement, it simply required him to undergo the examination required under the law as reinforced in consultation with the FMCSA. This is neither animus nor pretext.

Moreover, even the General Counsel conceded that sending McCallum to the medical evaluation could not have been *solely* based on animus, but rather was rooted in Respondent's sincere belief that McCallum, in fact, may not be medically qualified to perform the functions of a truck driver. The General Counsel argued to the ALJ that Respondent sent McCallum to the second evaluation because it believed and hoped he would not pass it. (GC Post-Hrg. Brf. p. 14).

Such is a concession that Respondent had a legitimate basis for believing that McCallum was not medically qualified to operate one of Respondent's trucks under the regulations. The only scenario in which sending McCallum for the second evaluation by Dr. Moiduddin could have been considered solely animus (and which scenario is not present here) would be if Respondent and Dr. Moiduddin unlawfully colluded to find McCallum medically unqualified. The General Counsel specifically stated it was *not* making any such allegation of collusion or undue influence by Respondent over Dr. Moiduddin and the record supports no such allegation. (Tr. 172).

McCallum was not "effectively terminated" and suffered no adverse action by being required, per the guidance and suggestion of the FMCSA, to undergo a second medical evaluation. Rather, any "effective termination" was the result of McCallum's failure to pass Dr. Moiduddin's evaluation and his further failure to adhere to Dr. Dr. Moiduddin's determination that he should undergo a Skills Performance Evaluation ("SPE") in order to become qualified. None of these things were created or influenced by Respondent—rather, they were determined by Dr. Moiduddin, who was in active consultation with McCallum's own treating physician. Contrary to the ALJ's determination, nothing in the evidence or facts shows that Respondent was motivated by anti-union animus (and certainly not solely by such animus) when it sent McCallum for the evaluation by Dr. Moiduddin. Yet, it is this erroneous determination of "sole" motivation that further precluded the ALJ from considering the relevant evidence or applying the applicable FMCSRs and which short circuited the remainder of the *Write Line* analysis which required the consideration (even assuming some level of animus was shown) of whether Respondent was justified in the circumstances to send McCallum for the second medical evaluation.

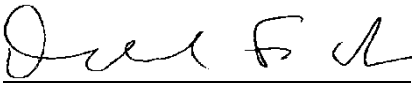
In taking the approach he did, the ALJ's decision effectively exempts McCallum from the FMCSRs and its otherwise mandatory medical certification provisions. By ruling that Respondent had no legitimate basis to send McCallum for the second evaluation (even though his medical condition, in fact, resulted in his failing that evaluation), the ALJ circumvented Dr. Moiduddin's recommendation (again, made in consultation with McCallum's own MS physician) that an SPE should be conducted to determine if McCallum's condition may still allow him to drive a truck. Also, the ALJ would have Respondent accept without question the competing evaluation completed outside of this process by Dr. Skomurski (to whom McCallum went for an evaluation instead of going to the prescribed SPE), even though Dr. Skomurski's evaluation was not tendered to Respondent until a few days before the hearing in this matter and even though the FMCSRs have a mechanism for handling competing medical evaluations (which mechanism McCallum did not avail himself). *See* FMCSR Section 391.47.

IV. CONCLUSION

For the reasons cited above, Respondent M.D. Miller Trucking & Topsoil, Inc. respectfully requests that the Board review and reverse Administrative Law Judge Sandron's proposed Decision and Order.

Dated: July 2, 2014.

M.D. MILLER TRUCKING & TOPSOIL, INC.

By: 

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CERTIFICATE OF SERVICE

Michael F. Hughes, an attorney for the Employer, hereby certifies that a true and correct copy of the foregoing Respondent M.D. Miller Trucking & Topsoil, Inc.'s Reply in Further Support of Its Exceptions to the Administrative Law Judge's Decision was served electronically upon the following on this 2nd day of July, 2014:

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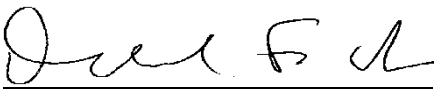
By: 

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